IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 2, 2003 Session

# JUSTIN C. EBERT v. IFEATU EKELEM

**Appeal from the Chancery Court for Williamson County**
**No. 24137 Elmer Davies, Judge**

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**No. M2002-00842-COA-R3-CV - Filed March 24, 2004**

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This case involves a dispute between a Williamson County property owner who decided to oversee the construction of his own house and the framing contractor he hired for the project. The framing contractor filed a breach of contract action in the Williamson County Chancery Court seeking to recover the balance owing on the contract. The property owner counterclaimed seeking to recover the costs he allegedly incurred to complete the framing and to repair deficient work. The trial court conducted a bench trial and awarded the framing contractor a $6,642.81 judgment. On this appeal, the property owner asserts (1) that the trial court should have dismissed the framing contractor's complaint because of defects in his lien, (2) that the judgment should have been offset by the cost of completing the work allegedly left unfinished by the contractor, and (3) that the contractor was not entitled to recover because he did not possess a license as required by the Contractors Licensing Act of 1994. We have determined that the framing contractor should have obtained a license because the total cost of the work exceeded $25,000 and, therefore, that Tenn. Code Ann. § 62-6-103(b) (Supp. 2003) limits the contractor's damages to his actual documented expenses. Accordingly, we vacate the judgment and remand the case.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN, J., and JAMES L. WEATHERFORD, SR. J., joined.

Ifeatu Ekelem, College Grove, Tennessee, Pro Se.

William C. Barnes, Jr., Columbia, Tennessee, for the appellee, Justin Ebert.

## OPINION

### I.

Dr. Ifeatu Ekelem is a physician specializing in neonatology. In 1994, he decided to build a 4,500 square foot house on his approximately 40-acre property in Williamson County. Rather than

hiring an architect and general contractor to assist him in this ambitious project, Dr. Ekelem elected to order the construction plans out of a book and to coordinate and supervise the project himself.

On February 14, 1995, Dr. Ekelem entered into a written agreement with Justin C. Ebert to do the framing and roofing on the project. The agreement required Dr. Ekelem to supply all materials necessary for the job and required Mr. Ebert to complete the framing and the roofing in a professional manner for the sum of $30,000. Dr. Ekelem agreed to pay Mr. Ebert in bi-weekly installments of $3,750 starting at the end of the second week of work. Mr. Ebert began work on Monday, March 6, 1995, and Dr. Ekelem made the first installment payment of $3,750 on Monday, March 20, 1995.[1]

Dr. Ekelem continued making the bi-weekly $3,750 installment payments until June 28, 1995. At that time, Mr. Ebert recognized that it was going to take him two weeks longer than he had initially planned to complete the project. Mr. Ebert suggested that Dr. Ekelem pay the remaining $7,500 in three installments of $2,500, rather than in two installments of $3,750. Dr. Ekelem agreed and made the first $2,500 payment to Mr. Ebert on Tuesday, July 4, 1995. Thus, as of July 4, 1995, Dr. Ekelem had paid Mr. Ebert a total of $25,000 toward the total contract price of $30,000. Up to this point, Dr. Ekelem had made no complaints about the job and, in fact, had repeatedly praised both the quality and timeliness of Mr. Ebert's work.

Mr. Ebert and his crew continued to work as usual for the next two weeks. However, Dr. Ekelem declined to pay the next installment when it came due on July 17, 1995 because he believed that Mr. Ebert had not made enough progress to be entitled to payment. When Mr. Ebert tried to show Dr. Ekelem that the work was progressing, Dr. Ekelem rebuffed him and insisted that he would not pay the next $2,500 installment until July 24, 1995.

The parties' relationship began to break down at this point. In addition to the disagreement regarding the unpaid progress payment, Dr. Ekelem had failed to reimburse Mr. Ebert for the materials Mr. Ebert had purchased to keep the project moving. Mr. Ebert presented Dr. Ekelem an invoice for these materials. Dr. Ekelem declined to pay Mr. Ebert the installment payment due on July 17, 1995 but wrote Mr. Ebert a $1,434.99 check to cover the cost of the materials. Unfortunately, the bank declined to honor the check because Dr. Ekelem, unbeknownst to Mr. Ebert, stopped payment on it.

On July 23, 1995, Mr. Ebert and Dr. Ekelem met to discuss the dishonored check, the unpaid installment payment that had been due on July 17, 1995, the materials needed to complete the job, and the final payment due on July 31, 1995. Dr. Ekelem wrote Mr. Ebert another check for $1,434.99[2] but insisted that he would make no further payments until Mr. Ebert completed the work. On July 25, 1995, Mr. Ebert and Dr. Ekelem had a heated confrontation at the job site after Mr. Ebert

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[1]Payment was actually due the preceding Friday under the terms of the parties' original agreement. However, because Dr. Ekelem was making the progress payments out of his own paycheck, he asked Mr. Ebert to accept the installment payments on the Monday following the Friday they became due. Mr. Ebert acquiesced in this arrangement.

[2]Dr. Ekelem did not stop payment on this check, and Mr. Ebert cashed it on July 24, 1995.

informed Dr. Ekelem that he was again running out of materials and that he needed additional materials because he intended to complete his work that week. Dr. Ekelem became enraged and refused to supply Mr. Ebert with additional materials. Dr. Ekelem cursed Mr. Ebert and then sped off down the driveway in his car. At that point, Mr. Ebert packed up his tools and left the job site. Before he left, he took photographs that depicted the status of the work. According to Mr. Ebert, approximately $615 worth of work remained to be completed when he left the job site.

On April 4, 1996, Mr. Ebert filed a notice of a $4,250 lien against Dr. Ekelem's property with the Maury County Register of Deeds.[3] He filed the lien with the Williamson County Register of Deeds on April 18, 1996. Nevertheless, Dr. Ekelem continued to refuse to pay Mr. Ebert the balance due on the contract.

On July 15, 1996, Mr. Ebert filed a complaint in the Williamson County Chancery Court against Dr. Ekelem for breach of contract, unjust enrichment, and enforcement of his lien. On December 19, 1996, Dr. Ekelem filed an answer and counterclaim admitting he had entered into a contract with Mr. Ebert to supply labor for the framing and roofing of his home. He also counterclaimed for $9,340 in damages caused by Mr. Ebert's alleged breach of contract and deficient work.

After a series of delays, the case proceeded to trial on March 1, 2002. Although Dr. Ekelem had been represented by counsel during part of the pretrial proceedings, he was representing himself pro se by the time of trial.[4] Mr. Ebert's case consisted of his own testimony supported by various exhibits. Dr. Ekelem cross-examined Mr. Ebert at length but, oddly enough, repeatedly expressed his admiration for Mr. Ebert throughout the cross-examination. Dr. Ekelem stated openly that he believed Mr. Ebert to be a trustworthy person, a person of good character, and an excellent carpenter.[5]

Mr. Ebert's lawyer offered to call two other contractors who had worked on Dr. Ekelem's house before concluding his case. Both of these contractors had testified earlier in the day in a similar suit against Dr. Ekelem, and Mr. Ebert's lawyer informed the trial court that they planned to testify about Mr. Ebert's solid reputation in the community for truthfulness and for doing quality work. The trial court responded that these witnesses would not be necessary. Dr. Ekelem then took the stand and testified in narrative form regarding his version of events. Following a brief cross-

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[3]Mr. Ebert derived the amount of the lien by subtracting the estimated cost of completing the work from the unpaid balance of the contract. [$5,000 - $750 = $4,250].

[4]The trial court permitted the law firm that first represented Dr. Ekelem to withdraw in February 1998. Nine months later, in November 1998, the trial court permitted Dr. Ekelem's second law firm to withdraw.

[5]Indeed, Dr. Ekelem opened his cross-examination of Mr. Ebert with the following statement:

> Mr. Ebert, before I even start, I would like to thank you for framing this house. I think you're a wonderful person and I think you did a wonderful job. I have to apologize about what happened, but hopefully the Court will allow me to get to the bottom of this case.

examination, the parties rested their cases. The trial court issued its ruling from the bench in favor of Mr. Ebert and followed up with a written judgment a few weeks later. In a judgment dated March 22, 2002, the trial court found that Mr. Ebert was entitled to a $6,642.81 judgment against Dr. Ekelem and that he was entitled to a judgment lien against Dr. Ekelem's property.

## II.
## DR. EKELEM'S BIAS CLAIMS

In a companion case filed today, we rejected Dr. Ekelem's claims that the judgment in that case was tainted by bias on the part of the trial judge against Dr. Ekelem because he acted pro se, because he is a doctor, or because of his race. *Wilkerson v. Ekelem*, No. M2002-00841-COA-R3-CV (Tenn. Ct. App. Mar. 24, 2004). The same trial judge who presided over that case presided over this case, and both cases were tried on the same day, one right after the other. We have conducted an independent review of the record and conclude in this case, as we did in *Wilkerson v. Ekelem*, that the trial judge, far from impeding Dr. Ekelem's presentation of his case, in fact bent over backwards to ensure that he in no way disfavored Dr. Ekelem because of his decision to proceed pro se. Moreover, in this case, as in *Wilkerson v. Ekelem*, Dr. Ekelem has pointed to nothing in the record that in any way suggests that the trial court treated him unfairly because of his decision to proceed pro se, because of his profession or race, or for any other extraneous reason. Accordingly, to the extent Dr. Ekelem challenges the trial court's judgment in this case on the basis of alleged bias against him on the part of the trial judge, we reject Dr. Ekelem's claim.

## III.
## THE RELATIONSHIP BETWEEN THE LIEN LAWS AND MR. EBERT'S CLAIMS

As in *Wilkerson v. Ekelem*, Dr. Ekelem argues in this case Mr. Ebert's claims should be barred because he failed to file a lien against the property within ninety days of leaving the job site. Unlike *Wilkerson v. Ekelem*, Dr. Ekelem may have some factual basis for his claim here because more than ninety days had elapsed between Mr. Ebert's last day on the job site and the date he recorded his notice of lien. However, Dr. Ekelem's argument must again fail because it lacks any basis in law. As we explained in *Wilkerson v. Ekelem*, the late filing of a lien has no impact on a contractor's ability to file a later lawsuit against a general contractor or property owner for breach of a construction contract. The statute of limitations for filing a claim for breach of contract is six years. Tenn. Code Ann. § 28-3-109(a)(3) (2000). Mr. Ebert filed his complaint against Dr. Ekelem on July 15, 1996, long before the expiration of the six-year statute of limitations. Accordingly, Dr. Ekelem's argument that the trial court erred in failing to dismiss Mr. Ebert's complaint because of the alleged late filing of the mechanics lien must fail.

## IV.
## THE TRIAL COURT'S CONCLUSION THAT MR. EBERT DID NOT BREACH THE CONTRACT

Dr. Ekelem also asserts that the trial court erred by finding that Mr. Ebert did not breach the parties' contract. This finding rests on the trial court's evaluation of the credibility of the witnesses and its assessment of the weight of their evidence. We accord great weight to these sorts of findings,

and will reverse them only when the evidence preponderates against them. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000).

We have conducted an independent review of the record on appeal in accordance with Tenn. R. App. P. 13(d) and are persuaded that the evidence, far from undermining the trial court's findings of fact, clearly supports them. Accordingly, we reject Dr. Ekelem's challenges to the trial court's factual finding that it was he rather than Mr. Ebert who breached the parties' contract.

## V.
## THE APPLICATION OF THE DAMAGE LIMITATION PROVISION IN TENN. CODE ANN. § 62-6-103(b) (SUPP. 2003) TO MR. EBERT'S CLAIM

Dr. Ekelem, however inartfully, has succeeded in raising one partially meritorious argument. He points out that the Contractors Licensing Act of 1994, as it read when the parties entered into their contract in 1995, prohibited individuals engaged in "contracting" from entering into contracts for $25,000 or more without having a contractor's license. In light of the undisputed fact that Mr. Ebert did not have a license, Dr. Ekelem argues that Mr. Ebert can recover nothing more from him because he has already paid Mr. Ebert $25,000. While Dr. Ekelem misapprehends the operation of the applicable statutes, we have concluded that Tenn. Code Ann. § 62-6-103(b) limits Mr. Ebert's recovery to his "actual documented expenses."

As we explained in *Wilkerson v. Ekelem* and *Winter v. Smith*, 914 S.W.2d 527, 536-37 (Tenn. Ct. App. 1995), the Tennessee General Assembly has frequently revised the contractors licensing statutes since they were originally enacted in 1931. The changes in the definitions of "contractor" and "contracting," coupled with the failure to define "subcontractor" or "subcontracting," have significantly altered the application of the licensing statutes to contractors like Mr. Ebert who believe that they need not be licensed because their contract covers only a portion of the work. However, as we pointed out in *Wilkerson v. Ekelem*, between 1994 and 1999, contractors like Mr. Ebert were required to be licensed if they contracted directly with the owner and the total cost of their work was $25,000 or more.

The licensing difficulties created by the changing definitions of "contractor" and "contracting" and the lack of a definition of "subcontractor" and "subcontracting" have been exacerbated by the Tennessee General Assembly's failure to address the licensing implications of circumstances like this case where a property owner decides to act as his or her own general contractor. While the General Assembly has excused these property owners from licensure, Tenn. Code Ann. § 62-6-103(a)(2)(A), it has not addressed the status of the contractors and tradespersons who contract directly with property owners who are building their own houses. These persons are not "subcontractors" because they are contracting directly with the owner, not with a general contractor. *Winter v. Smith*, 914 S.W.2d at 539. Accordingly, in the absence of an explicit statutory exemption from licensure, the licensing statutes, both in 1995 and now, require a contractor or tradesperson who contracts directly with a property owner to perform work that costs $25,000 or more to be licensed.

Mr. Ebert's confusion about the need for a license is understandable. The licensing scheme, with its byzantine history of amendments, is difficult for even judges and lawyers to follow. But even though Mr. Ebert is caught in a trap not of his own devising, he cannot escape the conclusion that he should have had a license to perform the framing work for Dr. Ekelem because the cost of the work exceeded $25,000. Since Mr. Ebert did not have a license, Tenn. Code Ann. § 62-6-103(b) limits his recovery from Dr. Ekelem to the "actual documented expenses" that he can prove by clear and convincing evidence.[6]

Even though we have concluded that the trial court properly determined that Dr. Ekelem, not Mr. Ebert, breached the parties' contract, we must vacate the judgment for Mr. Ebert and remand the case to the trial court for further proceedings consistent with this opinion.[7] Mr. Ebert should be given an opportunity to present evidence of the actual documented expenses he incurred in working on Dr. Ekelem's house. If Mr. Ebert presents clear and convincing evidence that these expenses exceed the amount of money Dr. Ekelem has already paid him, the trial court may award him the difference plus interest.

## VI.

We vacate the judgment and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to Ifeatu Ekelem and to Justin C. Ebert for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[6] Contrary to Dr. Ekelem's misreading of the licensing statutes, the damages that unlicensed contractors may recover is not capped at $25,000. An unlicensed contractor may recover actual documented expenses exceeding $25,000 as long as these expenses are proven by clear and convincing evidence.

[7] It is not our intention by remanding the case to give Dr. Ekelem another opportunity to press the claims that have already been found to be without merit by the trial court and this court. As we have explained, the trial court correctly held that Dr. Ekelem breached the parties' written contract and properly rejected Dr. Ekelem's counterclaim in its entirety. The only issue left open on remand is whether and to what extent Mr. Ebert's actual documented expenses for the work he performed exceed the $26,434.99 Dr. Ekelem paid him. If so, Mr. Ebert is entitled to a judgment against Dr. Ekelem for the amount by which his actual documented expenses exceeded $26,434.66. If, on the other hand, Mr. Ebert's actual documented expenses did not exceed the $26,434.66, the case must be dismissed.